SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION BY HEILIG BROTHERS CO. FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND TO THE UNITED STATES CIRCUIT COURT FOR THE THIRD CIRCUIT.

JOHN F. DUMONT, ESQ.,
Little Falls, New Jersey,
JOHN A. HOOBER, ESQ.,
York, Pennsylvania,
Counsel for Petitioner.

HARRY NADELL, ESQ.,
Paterson, New Jersey,
EDMUND M. TOLAND, ESQ.,
Washington, D. C.,
Of Counsel with Petitioner.

INDEX.

Subject Index.

AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION BY HEILIG BROTHERS CO. FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

ON PETITION BY HEILIG BROTHERS CO. FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner hereby prays for a writ of certiorari directed to the United States District Court for the Middle District of Pennsylvania, to review a decree rendered by

that Court on the 10th day of December, 1941, wherein the Court in said decision dismissed a petition for review of an order of the National Labor Relations Board, said petition for review having been filed on August 9, 1941, and in which the National Labor Relations Board was named as respondent. All proceedings before the United States District Court for the Middle District of Pennsylvania are set forth in the appendix A following the brief.

Your petitioner further prays for a writ of certiorari directed to the United States Circuit Court of Appeals for the Third Circuit to review a decree of that Court entered on the 2nd day of January, 1942 (petition for rehearing denied January 31, 1942), by which decree the Circuit Court of Appeals granted a petition of the National Labor Relations Board for enforcement of its order requiring petitioner to offer reinstatement to approximately sixty-five (65) striking employees, and to make said employees whole for loss of wages, in the event of failure to rehire them, etc., and further requiring petitioner to cease and desist from certain labor practices asserted to be prohibited by the National Labor Relations Act. (Act of July 5, 1935; 49 Stat. 449, Chap. 372; 29 U. S. C. A. sec. 151-166.) A copy of the order is set forth in full in the appendix of the brief filed herein.

I.

Summary and Statement of the Matter Involved.

Several major questions are presented to this Court for its consideration. (1) whether the constitutional rights of the petitioner are not grossly prejudiced by the failure of the District Court to entertain the petitioner's petition for review even though the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, Chap. 372; 29 U. S. C. A. sec. 151-166), does not specifically confer reviewing power upon a United States District Court. (2) whether the Circuit

Court erred in refusing to stay the proceedings before it until such time as there has been a final determination of the matters before the United States District Court. (3) whether the Circuit Court may in its discretion refuse a rehearing to petitioner because said Court has decided the matter in issue prior to a decision by this Honorable Court, which said decision has an important bearing with relation to the present case, more specifically referring to the decision rendered by this Court in the case of *National Labor Relations Board* v. *Virginia Electric and Power Company,* 86 L. Ed., Adv. p. 306. (4) whether the respondent Board has authority under the Act to order petitioner to reinstate said persons in the absence of evidence and findings of fact, that such persons had not obtained regular and substantially equivalent employment elsewhere, based upon the date of the issuance of respondent's order.

Petitioner is engaged in the manufacture of wire screen cloth. It has previously been stipulated that because of the nature of petitioner's business, petitioner is engaged in interstate commerce within the meaning of the Act.

The National Labor Relations Board through its Fourth Regional Office issued its complaint against petitioner on April 17, 1940. A formal hearing was held opening on May 7, 1940 and continuing through May 16, 1940. Thereafter on June 12, 1940 an order was issued transferring the case to the Board and directing that no intermediate report be issued by the Trial Examiner. On December 18, 1940, the Board issued its proposed findings of fact, conclusions of law and order. By the terms of the proposed findings of fact, conclusions of law and order, the petitioner was found to have committed certain labor practices alleged to be unfair and which were based upon Sec. 8 (1), (3) and (5) of the National Labor Relations Act. On February 4, 1941, oral argument was had before the Board in Washington and thereafter on June 10, 1941, the Board issued its

findings of fact, conclusions of law and order. Charges under Sec. 8, (3) were dismissed. However, the Board charged the company with having committed certain practices in violation of Sec. 8, (1) and (5).

The company through its agents and attorney, on August 9, 1941, duly filed a petition for review of the final order of the Board in the United States District Court for the Middle District of Pennsylvania. Thereafter, on or about September 6, 1941, the Board filed a motion to dismiss the petition hereinbefore referred to for lack of jurisdiction. Petitioner herein filed an answer to the Board's motion to dismiss on September 11, 1941, and a hearing was held before Judge Johnson on the 22nd day of October, 1941 in Scranton, Pennsylvania.

On or about the 7th day of October, 1941, the Board filed a petition for enforcement of its order with the United States Circuit Court of Appeals for the Third Circuit. Shortly thereafter, petitioner again petitioned the Circuit Court for a stay of the proceedings which would naturally arise as a result of the Board filing its petition for enforcement. The petition stated in substance that it was deemed desirable for the Circuit Court to withhold taking any action on the petition for enforcement of the Board's order until the matters in issue with the United States District Court had been determined. On October 20, 1941, argument was heard by the Honorable Judges of the Circuit Court of Appeals on the petition filed by the company asking for a stay, and on October 21, 1941, an order was entered denying the relief asked for. Inasmuch as argument on the proceedings before the District Court was scheduled for October 22, it does not appear that any harm would have resulted had the Circuit Court granted petitioner's request for a stay, pending determination of the District Court matter, and it is petitioner's contention that the Circuit Court erred in refusing to grant the stay, and by so

doing there arose prejudicial error on the part of the Circuit Court. Thereafter, and in view of the fact that the Circuit Court had refused to stay the Board's petition for enforcement, your petitioner herein filed an answer to the Board's petition for enforcement, on October 25, 1941. Oral argument before the Circuit Court was subsequently scheduled for December 17, 1941, and on January 2, 1942, the Circuit Court of Appeals entered its opinion in which it held that an order be entered ordering enforcement of the Board's order.

Thereafter, your petitioner herein applied to the Honorable Judges of the Circuit Court of Appeals for the Third Circuit for a rehearing and based the grounds for its petition on a decision rendered by this Honorable Court in the case of *National Labor Relations Board* v. *Virginia Electric and Power Company,* 86 L. Ed., Adv. p. 306, which said decision had not been brought to the attention of the Circuit Court by petitioner herein by virtue of the fact that this Honorable Court did not render its decision in the case hereinbefore referred to until after the Circuit Court of Appeals had heard argument of the Board's petition for enforcement. The petition for rehearing was summarily denied on January 31, 1942.

The petitioner alleges that the facts, matters and circumstances in its case are synonymous with the facts, matters and circumstances in the case of the Virginia Electric and Power Company. A copy of the company's petition for a rehearing, filed in the United States Circuit Court of Appeals for the Third Circuit is made a part of the appendix following the brief herein.

While the petitioner realizes that it is discretionary with the Circuit Court of Appeals to grant or to refuse a rehearing, nevertheless, it is petitioner's contention that the said Circuit Court may not overlook a new decision rendered by this Honorable Court particularly when said

decision affects the matter in issue, and that said failure to consider the decision of this Honorable Court in the aforesaid case was prejudicial error on the part of the Circuit Court.

II.

Reasons Relied On for Allowance of the Writ.

A. The first question presented in this case is whether the constitutional rights of the petitioner are not grossly prejudiced by the failure of the United States District Court for the Middle District of Pennsylvania to entertain its petition for review even though the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, Chap. 372; 29 U. S. C. A., Sec. 151-166), does not specifically confer such reviewing power upon the District Court.

Sec. 10 E of the National Labor Relations Act provides that:

> "The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States * * * within any circuit or district * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business * * * for appropriate temporary relief or restraining order, * * *."
>
> "The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended U. S. C., title 28, secs. 346 and 347)."

Sec. 10 G of the National Labor Relations Act provides that:

> "The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

Theoretically, if the National Labor Relations Board decided to enforce an order and the circuit court of appeals for its district and the court of appeals for the District of Columbia were in vacation, the Board would thereupon proceed to enforce its order in a district court. The company against whom it was proceeding would have only the right to petition the Circuit Court of Appeals for its district or the Circuit Court of Appeals for the District of Columbia, and if such petition for review was filed during vacation periods of either the circuit court for its district or the Court of Appeals for the District of Columbia, irreparable damage might be done to the company charged with the unfair labor practice by virtue of the proceedings on the part of the Board in the District Court.

Your petitioner therefore contends that in the case in issue, it was necessary to petition for review at the earliest possible opportunity and that thereupon it was presented to the United States District Court, inasmuch as the Circuit Court of Appeals for the Third Circuit and the Court of Appeals for the District of Columbia were then in vacation.

B. The second question presented herein is whether the United States Circuit Court of Appeals can ignore proceedings on a constitutional question in the same case where such proceedings have been started in a United States District Court, even assuming for the purpose of argument

that a United States District Court is a lower court. To the best of petitioner's knowledge, the point raised in the United States District Court on the constitutional question therein involved has never been decided by this Honorable Court in connection with a National Labor Relations Board case, and even though facts and statements in support of it were offered during argument held on petitioner's request for a stay on Board's petition for enforcement, the Circuit Court judges refused to grant the relief requested, and thereby prejudiced the rights of petitioner herein.

C. The third question presented herein is whether a Circuit Court of Appeals can refuse without any reason, to grant a rehearing to the petitioner herein when the subject matter of the petition for rehearing is based entirely upon new matter, to wit, the decision rendered in the *Virginia Electric and Power Company* case, which said case was not decided by this Honorable Court until after the petitioner herein had argued its case before the Circuit Court of Appeals, and it further appearing that petitioner had not had the opportunity to bring to the attention of the Court the significant aspects established by the decision in the *Virginia Electric and Power Company* case, which case is in many respects, analogous to the case at bar.

The Circuit Court's refusal to grant a rehearing had prejudiced the rights of the petitioner and is prejudicial error on the part of said Circuit Court.

D. The fourth question presented herein as to the construction of that portion of the National Labor Relations Act which permits the Board to order reinstatement of striking employees.

Sec. 10 C., in view of Sec. 2 (3) by which the word "employee" is defined to include persons who have terminated their employment because of a labor dispute, and

have not obtained other "regular and substantially equivalent employment".

In a case wherein an employee has ceased working because of a labor dispute, and taking into consideration the foregoing paragraph, certain questions have arisen in this case, namely;

(1) Whether there must be a finding of fact supported by evidence that the persons ordered to be reinstated have not prior to the date of the order obtained other "regular and substantially equivalent employment".

(2) Is it within the power of the Board to order reinstatement of named individuals without provision that persons so named secure such other equivalent employment prior to an offer of reinstatement.

The practical importance in the administration of the National Labor Relations Act of authoritative answer to these questions is apparent.

Wherefore Your Petitioner Prays, that a writ of certiorari issue under the seal of this Honorable Court, directed to the United States District Court for the Middle District of Pennsylvania to the end that the proceedings of that Court in this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States, and that the judgment of the said United States District Court for the Middle District of Pennsylvania be reversed.

And Your Petitioner Further Prays, that a writ of certiorari issue under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit to the end that the proceedings of that Court in this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of

the United States and that the judgment of the said Circuit Court of Appeals be reversed.

And For Such Further Relief as this Honorable Court may deem proper.

Respectfully submitted,

JOHN F. DUMONT,
JOHN A. HOOBER.

EDMUND M. TOLAND,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION OF HEILIG BROTHERS CO. FOR WRITS OF CERTIORARI, DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND TO THE UNITED STATES CIRCUIT COURT FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

Jurisdiction.

This case comes before the Court upon petition by Heilig Brothers Co. for writs of certiorari directed to the United States District Court for the Middle District of Pennsylvania and for the Circuit Court of Appeals for the Third Circuit, under Section 240 of the Judicial Code. (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 240, 36

Stat. 1157; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A., Sec. 347.)

Subsection (a) reads as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Statement of the Case.

On June 10, 1941 the National Labor Relations Board filed an order adjudging that the petitioner, Heilig Brothers Co., engaged in the manufacture and sale of screen cloth in York, Pennsylvania, had violated Sec. 8 (1) of the National Labor Relations Act relating to interference with the right of employees to join a union, and Sec. 8 (5) relating to refusal to bargain collectively with representatives of employees, and dismissing charges previously made under Sec. 8 (3), of discrimination in regard to hire by reason of union membership.

Petitioner, desiring a stay of the order of the Board pending a review by the Court, applied to the United States District Court for the Middle District of Pennsylvania by petition on August 9, 1941, all Circuit Courts of Appeal and the Court of Appeals for the District of Columbia being then on vacation. Sec. 10, subsections (e), (f) and (g) of the National Labor Relations Act, under which petitioner filed his petition for review with the United States District Court, are shown in the appendix at page 48 of this brief.

On September 6, 1941 the Board filed a motion to dismiss the petition for review before the District Court for lack of jurisdiction.

On September 11, 1941 petitioner filed an answer to the Board's motion to dismiss.

On October 7, 1941 the Board filed a petition for enforcement with the Circuit Court of Appeals for the Third Circuit. Argument on the application for enforcement was had before the Circuit Court of Appeals on October 20, 1941, at which time petitioner asked for a stay of enforcement of the order of the Board on the ground that there was a motion pending before the District Court for the review of the order, the petition for review in connection with this motion having been filed on August 9, 1941. The Circuit Court of Appeals was informed that the hearing before the District Court was to be heard two days later, on October 22, 1941, but on October 21, 1941 the Circuit Court of Appeals denied a stay.

On October 25, 1941 petitioner filed an answer to the Board's petition for enforcement in the Circuit Court of Appeals.

On December 10, 1941 the District Court dismissed the petition for review of the order of the Board on the ground of lack of jurisdiction, but notice of the decree of the District Court was not given to the attorney for the petitioner until shortly after December 17, 1941, on which date oral argument was had before the Circuit Court of Appeals on the petition for enforcement.

On January 2, 1942, the opinion of the Circuit Court of Appeals was filed granting the order for enforcement. Shortly thereafter application for rehearing before the Circuit Court of Appeals was made on the basis of the decision of this Court in *National Labor Relations Board* v. *Virginia Electric and Power Company*, 86 L. Ed., Adv.

p. 306, which decision was handed down subsequent to the oral argument before the Circuit Court of Appeals.

On January 31, 1942 the Circuit Court of Appeals denied the application for a rehearing.

Assignment of Errors.

(1) The District Court erred in dismissing the petition for review filed by petitioner on August 9, 1941 for lack of jurisdiction.

(2) The Circuit Court of Appeals erred in affirming the order of the Board insofar as it ordered re-instatement of named individuals without a finding of fact by the Board, supported by substantial evidence, that the persons ordered to be reinstated have not, prior to the date of the order, obtained other "regular and substantially equivalent employment", and without a provision in the order of the Board that the persons so named secure or attempt to secure such other equivalent employment prior to an offer of reinstatement.

ARGUMENT.

Point I.

On the equitable principle of mutuality of remedy, the District Court wrongfully refused to take jurisdiction of petitioner's application to review an administrative order which, during the vacation period of the Circuit Court of Appeals, it would, on application of the Board, have been bound to enforce.

A. *Equitable Nature of Proceeding before the Board and of Proceedings to Review or Enforce its Order.*

A proceeding before the National Labor Relations Board is equivalent to a suit in equity. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S.

1, 81 L. Ed. 893. In this case, upholding the constitutionality of the National Labor Relations Act, Mr. Chief Justice Hughes, rendering the opinion of the Court on writ of certiorari previously granted by the Court, mentioned the equitable nature of the proceeding, stating (at page 48 of 301 U. S. and page 918 of 81 L. Ed.) that it (the right of jury trial) "has no application where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law", citing *Clark* v. *Wooster,* 119 U. S. 322, 325, 30 L. Ed. 392, 393, and other cases.

To the same effect is the decision of this Court in the case of *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 83 L. Ed. 1147, involving the dismissal of a bill in the District Court to review an order of the Federal Communications Commission directing the Rochester Telephone Corporation to give certain information relative to whether it was under the control of the New York Telephone Company. On direct appeal to this Court, the Court affirmed the action of the District Court after examining the question of the jurisdiction of the District Court to make the order. Delivering the opinion of the Court, Mr. Justice Frankfurter said (at p. 142 of 307 U. S., p. 1159 of 83 L. Ed.):

> "An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted, citing *Inland Steel Co.* v. *U. S.,* 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415."

The equitable nature of the proceeding is shown by the fact that disobedience of a court decree enforcing the order of the Board is punishable by contempt proceedings. *National Labor Relations Board* v. *Hopwood Retinning Co.,* (C. C. A. 2nd) 104 Fed. (2d) 302. In this case the Court stated that as a proceeding for contempt,

it is a continuance of the earlier suit in the same court, (viz., in equity), and a step in the enforcement of the decree therein.

The fact that laches bars a recovery for contempt for disobedience of a court decree enforcing a Board order, emphasizes the equitable nature of the proceeding. *National Labor Relations Board* v. *American Potash and Chemical Corp.*, (C. C. A. 9th) 113 Fed. (2d) 232.

In *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 80 L. Ed. 1015, Mr. Justice Sutherland, delivering the opinion of this Court on writ of certiorari to review the decree of the Circuit Court of Appeals, dismissing, for lack of jurisdiction, petitioner's application to withdraw his request for registration with the Securities and Exchange Commission of a proposed issue of securities, said (p. 15 of 298 U. S., p. 1021 of 80 L. Ed.):

> "Such a proceeding (the stop order proceeding by the Commission) is analogous to a suit in equity to obtain an injunction, and should be governed by like considerations."

B. *Mutuality of Remedy as Applied to this Proceeding.*

It is a general principle of equity to grant a decree of specific performance only in cases where there is a mutuality of obligation, and when the remedy is mutual. *Dorsey* v. *Packwood*, 12 How. 126, 13 L. Ed. 921; *United States* v. *Noe*, 23 How. 312, 16 L. Ed. 462.

When a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other. *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339, 19 L. Ed. 955.

C. *Section 10 (e), (f) and (g) Construed under the Principle of Mutuality of Remedy.*

In the present case, under Sec. 10 (e) of the National Labor Relations Act (page 48 of this brief), the Board

may apply for an order of enforcement to the Circuit Court of Appeals, or if the Circuit Court of Appeals is in vacation, then to the District Court. Under subsection (f) the right of review of an order of the Board appears to lie only to the Circuit Court of Appeals. However, such a reading of Sec. 10 (e) and (f), would deprive the employer of an opportunity, during the vacation of the Circuit Court of Appeals, to apply to the District Court for a review of the Board's order and thereby to lay the basis for an application for a stay of the Board's order pending court review.

In the present case, the order of the Board was filed on June 10, 1941. Shortly thereafter the Circuit Courts of Appeal closed for the summer. In order to obtain a stay of the Board's order pending court review, it was necessary for the petitioner to take an appeal to a court sitting during the summer, namely, the District Court, which he did on August 9, 1941. The necessity for such a step is indicated by subsection (g) of Sec. 10, which provides that:

> "the commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

It has been held that the provisions of a statute regarding its enforcement and review must be read together. *Crancer* v. *U. S.*, 23 F. Supp. 690 (D. C., E. D. Missouri), affirmed per curiam 305 U. S. 567, 83 L. Ed. 357. This was a suit to enjoin the enforcement of an order of the Interstate Commerce Commission refusing the application of the petitioner to have certain rates, less than those charged by the carrier to him, applied by the Commission to certain commodities. Denying the petitioner relief, the District Court said on page 691:

> "This court is not vested with authority to review generally orders of the Commission. The jurisdiction of

the Court in such matters is granted by the statute, 28 U. S. C. A. Sec. 41 (27), (28), in the following instances.

(1) Of all cases for the enforcement of any order of the I. C. C.

(2) Of all cases to set aside, annul, or suspend, in whole or in part, any order of the I. C. C.

"The Supreme Court has consistently ruled that these two paragraphs are to be read together."

The refusal of the District Court to enjoin the enforcement of the order of the I. C. C. was affirmed by this Court. While the ground on which the District Court went, viz., the distinction between a so-called "affirmative" and a so-called "negative" order has been repudiated by this Court in *Rochester Telephone Corporation* v. *U. S.*, 307 U. S. 125, 83 L. Ed. 1147, nevertheless the case may be supported on the principle of administrative finality, laid down in the *Rochester* case, the question of what rate to apply under the circumstances of the *Crancer* case being essentially one for the judgment of the Interstate Commerce Commission, supported as it was by substantial evidence.

There is no doubt that the enforcement and reviewing provisions with respect to an order of the Interstate Commerce Commission apply equally to the enforcement and reviewing provisions of an order of the National Labor Relations Board. To grant to the Board the right to enforce, while denying to the petitioner the right to review, in the District Court, an order of the Board during the vacation of the Circuit Court of Appeals is a denial of mutuality of remedy accorded in courts of equity.

Subsection (f) of Sec. 10 provides in its last sentence that upon such filing (of a transcript of the entire record

by the aggrieved party) the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

A reading together of subsections (e) and (f) lays a basis for petitioner's contention that if the court shall proceed in the same manner under subsection (f) for review, as in the case of an application by the Board under subsection (e) for enforcement, then if the Circuit Court of Appeals is in vacation, the application may be made to the District Court.

Subsection (e), first sentence, provides that the Board shall have power, in connection with an application to the Court for enforcement, to apply for appropriate temporary relief or restraining order. It is to this provision that the last sentence of subsection (f) applies, that the court shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Enforcement and review are merely different aspects of the same process, namely, the determination of the validity of an order of the Board. Access to the District Court during the vacation period and power to apply to the court for temporary relief belong equally to the petitioner and to the Board. A reading of subsection (e) and (f) which gives such right to the Board and denies it to the petitioner is as much subject to question as the attempt to procure from this Court in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 80 L. Ed. 1015, a decision that the Commission had the right to question the applicant after he had voluntarily withdrawn his application for registration. The language of Mr. Justice Sutherland,

speaking for the Court, is equally applicable to both situations (p. 23 of 298 U. S., p. 1025 of 80 L. Ed.):

> "The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L. Ed. 746, 752, 6 S. Ct. 520, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be obsta principiis.'
>
> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces, and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' *Garfield* v. *United States*, 211 U. S. 249, 262, 53 L. Ed. 168, 174, 29 S. Ct. 62. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power of lesser agencies as well. And if the various administrative bureaus and commis-

> sions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties * * *."

While it may be urged on behalf of the Board that a reading of subsections (e) and (f) giving it the right to apply for an order of enforcement during vacation period, while denying the right to seek a review from the District Court on the part of the petitioner, so that he might apply for a stay, is only a "slight deviation from legal modes of procedure", it is as much a denial to him of the equal protection of the laws and as much a denial of liberty or property without due process as it was to subject the applicant Jones to examination before the Securities and Exchange Commission after he had withdrawn his application.

In any case, irrespective of the view that this Court takes as to the proper construction of subsections (e) and (f) of Sec. 10 of the National Labor Relations Act, an important question is raised, as to which counsel have been unable to find any guide by decision of this Court.

Point II.

The denial by the District Court of petitioner's right of review by that court, during the vacation period of the Circuit Court of Appeals, raises an important question of the construction of the National Labor Relations Act which this Court should determine by certiorari.

The object of the review by this Court by certiorari under Sec. 240 of the Judicial Code (28 U. S. C. A., Sec. 347) is

to secure uniformity of rulings among the Circuit Courts as well as to have this Court pass on matters of importance.

Warner v. *New Orleans*, 167 U. S. 467, 42 L. Ed. 239;
Hamilton Brown Shoe Co. v. *Wolf*, 240 U. S. 251, 60 L. Ed. 629;
Houston Oil Co. v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385.

Cases where this Court has granted certiorari on the ground of the importance of the question involved include the following:

(1) A case involving the extent of mineral rights concerned in a long litigation. *Montana Mining Co.* v. *St. Louis Mining & Milling Co.*, 204 U. S. 204, 51 L. Ed. 444.

(2) A case involving the question of whether a Chinese merchant, domiciled here for many years, must on his return from a visit to China, present the certificate required by the Chinese Exclusion Act. *Ex parte Lau Ow Bew*, 141 U. S. 583, 35 L. Ed. 868.

(3) Cases as to the effect of findings of fact by the National Labor Relations Board.

National Labor Relations Board v. *Waterman S. S. Corp.*, 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied in 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611;
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584, 85 L. Ed. 368, 61 S. Ct. 358.

(4) Cases involving the administration of the National Labor Relations Act.

H. J. Heinz Company v. *National Labor Relations Board*, 311 U. S. 514, 85 L. Ed. 309;
National Labor Relations Board v. *Virginia Electric and Power Company*, — U. S. —, 86 L. Ed., Adv. p. 306.

On certiorari, this Court is vested with a "comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality, and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination". *Forsyth* v. *Hammond*, 166 U. S. 506, at p. 513, 41 L. Ed. 1095, at p. 1098.

The entire case may be brought before the Supreme Court for examination, although the Circuit Court of Appeals may have been precluded from a consideration of all the questions in the case by reason of its decree on a prior appeal. *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 41 L. Ed. 1004.

As was stated by Mr. Justice Sutherland, rendering the unanimous decision of the Court in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, at p. 567, 75 L. Ed. 544, at p. 551, on certiorari, the entire record is before this Court.

Applying these principles to the present suit, the action of the District Court in dismissing, for lack of jurisdiction, the application of petitioner to review the order of the Board, is part of the entire proceedings in the case which may be brought up on writ of certiorari.

The refusal of the District Court in the present case to take jurisdiction during the vacation of the Circuit Court of Appeals, of an application to review an order of the National Labor Relations Board, while recognizing the right of the Board to apply to the District Court in vacation for an order of enforcement raises a serious question

of the interpretation of Sec. 10 (e) and (f) of the National Labor Relations Act.

Since the denial of certorari by this Court imports no expression of opinion on the merits of the case (*U. S.* v. *Carver*, 260 U. S. 482, 490, 67 L. Ed. 361, 364; *Atlantic Coast Line R. R.* v. *Powe*, 283 U. S. 401, 403, 75 L. Ed. 1142, 1143), and since the question raised as to the proper construction of Sec. 10 (e) and (f) is an important one, which should be adjudicated by this Court, certiorari should issue from this Court for that Purpose.

Point III.

The Circuit Court of Appeals erred in affirming the order of the Board insofar as it ordered re-instatement of named individuals without a finding of fact by the Board, supported by substantial evidence, that the persons ordered to be reinstated have not, prior to the date of the order, obtained other "regular and substantially equivalent employment", and without a provision in the order of the Board that the persons so named secure or attempt to secure such other equivalent employment prior to an offer of reinstatement.

Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U. S. 177, 85 L. Ed. 1271.

As was stated by Mr. Justice Frankfurter, rendering the opinion of the Court, (313 U. S. 177 at p. 197, 85 L. Ed. 1271 at p. 1284):

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (Sec. 10 (e) and (f), 29 U. S. C. A. Sec. 160 (e) and (f)), it will avoid needless litigation and make for effective

and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board."

Applying this decision to the present suit, the affirmance by the Circuit Court of an order of the Board ordering re-instatement of named individuals without a finding of fact by the Board, supported by substantial evidence, that the persons ordered to be re-instated have not, prior to the date of the order, obtained other "regular and substantially equivalent employment", and without a provision in the order that the persons so named secure or attempt to secure such other equivalent employment prior to an offer of re-instatement, was prejudicial error which this Court by certiorari should review.

It is respectfully submitted that this Court should take jurisdiction, by the issuance of certiorari to the United States District Court for the Middle District of Pennsylvania, and to the Circuit Court of Appeals for the Third Circuit, for the purpose of a determination by this Court of the doubtful construction of subsections (e) and (f) of Sec. 10 of the National Labor Relations Act.

Respectfully submitted,

JOHN F. DUMONT,
JOHN A. HOOBER,
HARRY NADELL,
Attorneys for Petitioner.

EDMUND M. TOLAND,
Of Counsel with Petitioner.

APPENDIX "A".

Civil DOCKET Closed No. 737 June Term, 194

TITLE OF CASE	ATTORNEYS
Meiling Bros. Company vs. National Labor Relations Board Basis of action: Petition for review of order of the National Labor Relations Board.	For Plaintiff: John A. Hoober, 124 E. Market St., York, Pa. John F. Dumont, 86 Main St., Little Falls, For Defendant: Ernest A Gross Asst. General Counsel. N. L. R. B. Washington, D.C. Messrs. Ath Heyand, attorneys N.L.R.B. Washington, D.C.

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
1941 Aug 14	John A Hoober	15-					
SEP 30 1941	Use U.S. Treas.		5-				
12 1941	John A. Hoober		5-				
DEC 31 1941	Use U.S. Treas.		5-				

ABSTRACT OF COSTS		RECEIPTS, REMARKS, ETC.
TO WHOM DUE	AMOUNT	

No. 737 June Term, 1941.

DATE 1941	FILINGS—PROCEEDINGS (E) Albert W. Johnson			
Aug. 14	Petition for review of an order of the	5.00		
	National Labor Relations Board.			
	J. S. 5.			
Sep. 10	Affidavit of service of motion to dismiss for			
	lack of jurisdiction.			
" 11	Answer of plaintiff to respondents motion to			
" "	dismiss for lack of jurisdiction.			
" 11	Motion of defendant to dismiss for lack of		5-	
" "	jurisdiction over the subject matter.			
" 11	Notice that motion will be brought on for			
" "	hearing at Scranton, Oct. 6, 1941 at 11 A. M.			
" "	L. D. S.			
" 11	Affidavit of service of notice.			
" 23	Affidavit of service of motion.			
" 26	Praecipe for appearance of Miss Ruth Wygand,			
" "	attorney for defendant. J. S.	9/30/41	41	5-
Nov. 10	Order, Motion to dismiss is sustained,			
" "	petition for review is dismissed and an			
" "	exception is granted the petitioner. (J)	5-		
" "	J. D. L. (Copies mailed counsel for Pltf. 12/10/41)	12/31/41		5-

Certified from the record

Date APR 15 1942

W. H. Mitchell, Clerk

Per M. M. Mackey
Deputy Clerk.

296

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROS. COMPANY, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of an Order of the National Labor Relations Board.

PETITION.

To the honorable Judges of the United States District Court for the middle district of Pennsylvania:

Your petitioner, Heilig Bros. Company, with its principal place of business in the City of York, County of York and State of Pennsylvania, respectfully shows that:

1. Your petitioner was the respondent company in a matter entitled "In the Matter of Heilig Bros. Co., and Local Union No. 2151, Steel Workers' Organizing Committee." Said case has been further designated by the National Labor Relations Board as Case C-1609.

2. On or about the 17th day of April, 1940, the National Labor Relations Board, hereinafter called the Board, through its Regional Director for the Fourth Region (said Fourth Region having its offices in Philadelphia, Pennsylvania) issued its complaint against Heilig Bros. Co., your petitioner herein, alleging said Company had engaged in and was engaging in certain unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3) and (5), and Section 2 (6) and (7), of the National Labor Relations Act.

3. A hearing was thereafter held and subsequently the Board, under authority conferred upon it, waived the issuance of the Trial Examiner's Intermediate Report, and

stated that Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order be issued.

4. On or about December 18th, 1940, the Board, in fact, did issue its Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order. Said Findings and Order found your petitioner herein had engaged in certain alleged unfair labor practices.

5. On or about January 9th, 1941, your petitioner duly filed exceptions to the Findings, Conclusion and Order, and thereafter and on or about February 4th, 1941, argued the matter orally before the Board in Washington, D. C.

6. On or about the 10th day of June, 1941, the Board issued its Decision and Order, which Decision and Order is in the nature of a final determination of said cause insofar as the Board is concerned.

7. By the terms of said Decision and Order the Board found that your petitioner had rightfully discharged Daniel Wagner and dismissed its complaint against your petitioner for alleged violations of Section 8 (1) and (3) of the Act, insofar as the same pertained to said Daniel Wagner. However, the Board found the petitioner herein to have violated Section 8 (1) and (5), of said Act, and to have indulged in unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

8. It is with respect to the said alleged violations as charged by the Board in its Decision and Order that your petitioner takes issue, and your petitioner respectfully urges this Honorable Court to review the Order of said Board, wherein said Decision and Order finds your petitioner has violated Section 8 (1) and (5) and Section 2 (6) and (7) of said Act.

9. This Honorable Court may be of the opinion that there is a jurisdictional question involved which would prevent it from taking cognizance of this matter wherein Section 10 (f) of the Act provides that "Any person aggrieved by a final order of the Board • • • denying in whole or in part the relief sought, may obtain a review of such

order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. "However, Section 10 (e) of the Act provides that

"The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), *or if all the circuit courts of appeal to which application may be made are in vacation, any district court of the United States* • • • *within any* • • • *district wherein the unfair labor practice in question occurred or wherein such person resides or transacts business* • • • *for appropriate temporary relief or restraining order.*"

The Circuit Court of Appeals for the District wherein your petitioner resides and transacts its business is presently in vacation and will not reconvene for some time. Thus it is the contention of the petitioner that in order to expedite the review of this matter it may be brought within the jurisdiction of this Honorable Court, even though said remedy is not specifically afforded to your petitioner in the National Labor Relations Act.

Your petitioner further avers that it cannot at this time avail itself of the jurisdiction of the Court of Appeals for the District of Columbia, your petitioner having ascertained that said Court is also in vacation. It, therefore, appears that petitioner should be afforded the rights and remedies available to the Board under like and similar circumstances, it appearing that unless this Honorable Court will take cognizance of this matter that petitioner has no means of reviewing said Board's order at this time.

10. Section 10 (g) of the Act further provides that

"The commencement of proceedings under sub-section (e) or (f) of this section (quoted earlier herein) shall not,

unless specifically ordered by the Court, operate as a stay of the Board's order."

Your petitioner respectfully prays that at the time this Honorable Court assumes jurisdiction herein, that said Court will grant to petitioner an order staying any further action on the part of the Board, pending final determination hereof.

11. Your petitioner alleges that the Board, in its Decision and Order, directed petitioner to take certain affirmative action more particularly referring to Section 1 (a) and Section 2 (b), (c) of the Order, although by specifically referring to the within sections petitioner does not want to limit the attention of the Court to those sections alone, but respectfully requests this Honorable Court to review the case in its entirety.

12. Your petitioner respectfully urges as some of the grounds for reversal and which may be summarized as follows:

(a) There does not appear in the record competent substantial evidence to support the Board's finding of an alleged refusal to bargain with the complaining union;

(b) The record fails to disclose competent substantial evidence of unfair discrimination on the part of petitioner against any of its employees;

(c) The petitioner was deprived of its right to full cross examination on one or two occasions during the course of the hearing; Petitioner herein was the respondent at that time;

(d) The Board failed to sustain its charges and allegations by a preponderance of the evidence, as required by law;

(e) Your petitioner reserves the right to file additional grounds of appeal in lodging the record with the Court.

13. Certified copies of this Appeal and any order to be made thereunder shall be sent to the Regional Director of the National Labor Relations Board, for the Fourth Region,

and to Michael Harris, of the Steel Workers' Organizing Committee.

14. In conclusion, therefore, your petitioner respectfully urges this Honorable Court to review the matter in issue, to grant to petitioner an order staying any further action on the part of the National Labor Relations Board, pending determination herein, and to set aside the order of the Board hereinbefore referred to.

And your petitioner will ever pray, &c.

JOHN A. HOOBER,
124 East Market Street,
York, Pennsylvania,
JOHN F. DUMONT,
#85 Main Street,
Little Falls, New Jersey,
Attorneys for Petitioner.

STATE OF PENNSYLVANIA,
County of York, ss:

Before me the undersigned a Notary Public in and for said County and State personally appeared Cyrus H. Heilig, president of the above named petitioner, who being affirmed according to law avers that the facts set forth are true and correct to the best of his knowledge, information and belief.

CYRUS H. HEILIG.

Affirmed and subscribed to before me this 8th day of August, 1941.

MYRTUS E. MICKLEY OLP,
[SEAL.] *Notary Public.*

My Commission Expires March 9, 1943.

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] United States District Court for the Middle District of Pennsylvania. 737 Civil. Heilig Bros. Company, Petitioner, vs. National Labor Relations Board, Respondent. On Petition for Review of an Order of the Na-

tional Labor Relations Board. Petition. John A. Hoober, 124 East Market Street, York, Pennsylvania; John F. Dumont, #85 Main Street, Little Falls, New Jersey, Attorneys for Petitioner. Filed Aug. 14, 1941. W. H. Mitchell, Clerk.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROS. COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

AFFIDAVIT OF SERVICE.

DISTRICT OF COLUMBIA, *ss:*

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 6th day of September 1941, I mailed postpaid, by registered mail bearing Government frank, one copy of the motion to dismiss for lack of jurisdiction over the subject matter to the following named person, at the following address:

John F. Dumont, Esquire
85 Main Street
Little Falls, New Jersey

VERNON S. GREEN.

Subscribed and sworn to before me this 8th day of September 1941.

DANIEL T. GHENT, JR.,
Notary Public, District of Columbia.

My Commission expires August 31, 1944.

[Endorsed:] No. 737 Civil. Heilig Bros. Co. vs. N. L. R. B. Affidavit of Service. Filed Sep. 10, 1941. W. H. Mitchell, Clerk, Per L., Dept.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

737 Civil.

HEILIG BROS. CO., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of an Order of the National Labor Relations Board.

BY WAY OF ANSWER TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER.

To the Honorable the Judges of the United States District Court for the Middle District of Pennsylvania:

Heilig Bros. Co., your Petitioner herein, respectfully submits that it has been served with a copy of a Notice of Motion to Dismiss the Petition hereinbefore filed by it, which Notice of Motion suggests that said Petition should be dismissed because of the lack of jurisdiction of this Honorable Court over the subject matter herein. Heilig Bros. Co. respectfully submits this by way of answer to said Notice of Motion and shows as follows:

1. Your Petitioner avers that the contention of the Respondent is erroneous wherein Respondent states that this Honorable Court is without jurisdiction, inasmuch as the Petitioner in this Petition has set forth certain sections of the Act upon which it submits that relief cannot be granted to one of two parties in dispute without affording the other party the right to relief as well.

2. Your Petitioner respectfully calls to the attention of this Honorable Court Paragraph 9 and Paragraph 10 of its Petition, and prays leave to incorporate said aforementioned paragraphs in this answer, making them a part hereof without repeating said paragraphs verbatim.

3. Your Petitioner submits that the contention of Respondent in its Motion to Dismiss said Petition for lack of juris-

diction over the subject matter is erroneous in that such Motion for Dismissal, were same to be acted upon, would deprive Petitioner of certain rights which have accrued to Petitioner even though the same are not specifically stated in the National Labor Relations Act.

4. Your Petitioner in referring more specifically to Respondent's Motion to Dismiss takes issue with respondent in connection with the numbered paragraphs set forth in said Motion as follows:

(1) By way of response to Paragraph 1 your Petitioner refers to Paragraphs 9 and 10 of said Petition particularly referring to Paragraph 9 together with the reasons set forth therein.

(2) The Petitioner takes issue with Paragraph 2 of Respondent's Motion to Dismiss and again refers this Honorable Court to Paragraph 9 of the Petition hereinbefore filed by the Petitioner.

(3) As to Paragraph 3 of Respondent's Motion to Dismiss, your Petitioner respectfully submits that the law stated therein is misleading and not herein applicable.

(4) As to Respondent's contentions as set forth in Paragraph 4 of the Notice of Motion; your Petitioner avers that the law therein stated is not applicable, in view of the fact that your Petitioner well knows that Congress has the right to confer reviewing powers to the Circuit Courts of Appeals. However, your Petitioner maintains that the Board is given certain rights within the District Court of the United States in such cases wherein the Circuit Courts are on vacation, and it is the contention of your Petitioner that such rights cannot be given to one party to a suit without affording the other party equal remedies.

(5) By way of response to Paragraph #5 of Respondent's Notice of Motion it appears to Petitioner that Respondent's choice of law is illfounded wherein the facts and matters therein contained are in no wise comparable with the matter in issue.

(6) As to Paragraph #6 in Respondent's Notice of Motion your Petitioner respectfully submits that it is for this Honorable Court to determine as to whether it can assume jurisdiction and your Petitioner respectfully submits that this Honorable Court would be depriving Petitioner of its Constitutional right to its day in Court were this Honorable Court to forthwith dismiss said Petition.

5. In conclusion, therefore, your Petitioner respectfully urges this Honorable Court to dismiss Respondent's Motion.

And your Petitioner will ever pray.

JOHN F. DUMONT,
85 Main Street,
Little Falls, N. J.

JOHN A. HOOBER,
124 East Market St.,
[SEAL.] *York, Pennsylvania.*

Certified from the record. Date April 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] United States District Court for the Middle District of Pennsylvania. Heilig Bros. Co., Petitioner, vs. National Labor Relations Board, Respondent. Copy. By Way of Answer to Respondent's Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter. John F. Dumont, Attorney for Petitioner, 85 Main Street, Little Falls, N. J. John A. Hoober, Attorney for Petitioner, 124 E. Market St., York, Pennsylvania. Filed Sep. 11, 1941. W. H. Mitchell, Clerk, Per —— ——, Dept.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

737 Civil.

HEILIG BROS. COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review of an Order of the National Labor Relations Board.

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

To the Honorable the Judges of the United States District Court for the Middle District of Pennsylvania:

Comes now the National Labor Relations Board, respondent herein, and moves this Court to dismiss the petition filed herein to review an order of the Board. In support of said motion, the Board respectfully shows as follows:

1. After due proceedings under the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 *et seq.*), the Board on June 10, 1941, issued an order against the petitioner. Thereafter a petition to review was filed with this Court in which jurisdiction is sought to be conferred on this Court by virtue of a contention that Section 10 (e) of the Act is equally applicable to petitioner, as well as to the Board (see paragraph 9 of petition, pages 3 and 4). That such a contention is clearly erroneous becomes evident when subsections (e) and (f) of Section 10 of the Act are examined in their entirety. Said subsections provide as follows:

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit court of appeals to which application may be made are in vacation, any district court of the United States

(including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made

to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

2. These subsections of the Act, set forth above, are explicit as to what courts of the United States shall be empowered to review, or enforce orders of the Board. Section 10 (e) is devoted exclusively to the institution of proceedings by the Board for the enforcement of its orders, and commences, *"The Board shall have the power"*, while Section 10 (f) is devoted solely to the institution of proceedings by a party aggrieved by an order of the Board, and commences, *"Any person aggrieved"*. Provision is not only made for the courts in which the power of appellate

jurisdiction is vested, but also, it is provided that the courts so vested shall have *exclusive jurisdiction.* The Act is unambiguous in these respects.

3. Congress has conferred reviewing powers on the Circuit Courts of Appeals of the United States under the Act, and this power may not be extended beyond what is definitely conferred by its terms. *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509 (App. D. C.); *Universal Service Wireless, Inc.* v. *Federal Radio Commission,* 41 F. (2d) 113, 115 (App. D. C.). The Court, in the *Pote* case, in dismissing an appeal therein for lack of jurisdiction, stated:

The right of appeal to this court from any decision of the Federal Radio Commission is not allowed as a matter of course, but is purely statutory, and the terms of the statute must be strictly followed. As was said by us in Universal Service Wireless, Inc., v. Federal Radio Commission, 59 App. D. C. 319, 41 F. (2d) 113, 115:

"The right of appeal being a statutory one, this court cannot dispense with its express provisions, even to the extent of doing equity."

4. That Congress has the right to confer reviewing powers on the Circuit Courts of Appeals, and the constitutionality of this right, has already been decided by the Supreme Court. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46, 47. Here the Supreme Court stated:

* * * The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative

agencies set up by Congress to aid in the enforcement of valid legislation.

5. The lack of jurisdiction of this Court, or any District Court, as pertains to the review of orders of the Board has been decided by the Supreme Court. *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, Ltd., 303 U. S. 41, 48, where the Court said:

Second. The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce", has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."[5] The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.

On page 50 of this opinion the Supreme Court further stated:

"Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and

---

[5] Compare House Committee Report, H. R. Rep. 1147, 74th Cong., 1st Sess., p. 24: "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

the Circuit Court of Appeals. *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337, 343-346."

6. It is submitted therefore, that as Congress has by statute conferred exclusive jurisdiction upon the Circuit Courts of Appeals of the United States to review orders of the National Labor Relations Board, this action has been improperly brought and should be forthwith dismissed.

It is accordingly prayed that the petition be dismissed for lack of jurisdiction over the subject matter.

Respectfully submitted,

(S.) ERNEST A. CROSS,
Assistant General Counsel,
NATIONAL LABOR RELATIONS BOARD.

[Endorsed:] 737 Civil. Heilig Bros. Co. v. N. L. R. B. Motion to Dismiss. Filed Sep. 11, 1941. W. H. Mitchell, Clerk, Per L., Dept.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737, Civil.

HEILIG BROS., CO., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of an Order of the National Labor Relations Board.

NOTICE OF MOTION.

To: John F. Dumont, Esquire, 85 Main Street, Little Falls, N. J., and John A. Hoober, Esquire, 124 E. Market Street, York, Pa., Attorneys for Plaintiff:

Please Take Notice, that the undersigned will bring on its Motion to Dismiss for Lack of Jurisdiction over the

subject matter, previously served upon you, for hearing before this Court at the Court Room, United States Post Office and Courthouse, Scranton, Pennsylvania, on the 6th day of October, 1941, at 11 o'clock, Eastern Standard Time, in the forenoon of that day, or as soon thereafter as counsel can be heard.

LAURENCE A. KNAPP,
[SEAL.] *Associate General Counsel.*

Dated at Washington, D. C., this 19th day of September, 1941.

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig Bros. vs. N. L. R. B. Notice of Motion. Filed Sep. 22, 1941. W. H. Mitchell, Clerk, Per L., Dept.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737, Civil.

HEILIG BROS., CO., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of an Order of the National Labor Relations Board.

AFFIDAVIT OF SERVICE.

DISTRICT OF COLUMBIA, ss:

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 19th day of September, 1941, I mailed postpaid, by registered mail bearing Government frank,

one copy each of the Board's Notice of Motion to the following named persons, at the following address:

John F. Dumont, Esquire, 85 Main Street, Little Falls, N. J.

John A. Hoober, Esquire, 124 E. Market Street, York, Pa.

VERNON S. GREEN.

Subscribed and sworn to before me this 20th day of September 1941.

DANIEL T. GHENT, JR.,
Notary Public, District of Columbia.

My Commission expires Aug. 31, 1944. [Seal].

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig Bros. vs. N. L. R. B. Affidavit of Service. Filed Sep. 22, 1941. W. H. Mitchell, Clerk, Per L., Dept.

Duplicate.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. —.

HEILIG BROS. COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

AFFIDAVIT OF SERVICE.

DISTRICT OF COLUMBIA, ss:

I, Vernon S. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 6th day of September 1941, I mailed postpaid, by registered mail bearing Government frank,

one copy of the motion to dismiss for lack of jurisdiction over the subject matter to the following named person, at the following address:

John F. Dumont, Esquire, 85 Main Street, Little Falls, New Jersey.

VERNON S. GREEN,

Subscribed and sworn to before me this 8th day of September 1941.

DANIEL T. GHENT, JR.,
[SEAL.] *Notary Public, District of Columbia.*

My commission expires August 31, 1944.

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig vs. N. L. R. B. Proof of Service of Motion. Filed Sep. 23, 1941. W. H. Mitchell, Clerk, Per L., Dept.

NATIONAL LABOR RELATIONS BOARD.
Washington, D. C.

Office of the General Counsel.

September 24, 1941.

W. H. Mitchell, Esquire,
Clerk, United States District Court for
the Middle District of Pennsylvania,
Scranton, Pennsylvania.

Re: Heilig Bros. Company v. National Labor Relations Board, No. 737 Civil.

DEAR MR. MITCHELL:

Will you please enter my appearance on behalf of the Board in the above-entitled matter.

Sincerely yours,

(MISS) RUTH WEYAND,
Attorney,
National Labor Relations Board,
[SEAL.] *Washington, D. C.*

Certified from the record. Date Apr. 15, 1942. W. H. Mitchell, Clerk, Per M. W. Maxey, Deputy Clerk.

[Endorsed:] 737 Civil. Heilig Bros. vs. N. L. R. B. Praecipe for Appearance. Filed Sep. 26, 1941. W. H. Mitchell, Clerk, Per L., Dept.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROTHERS COMPANY, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

MOTION TO DISMISS.

Appearances.

For Petitioner:
John A. Hoober, Esquire, 124 East Market Street, York, Pennsylvania.
John F. Dumont, Esquire, 85 Main Street, Little Falls, New Jersey.

For Respondent:
Miss Ruth Weyand, Attorney, National Labor Relations Board, Washington, D. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 737 Civil.

HEILIG BROS. COMPANY, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

MOTION TO DISMISS.

ORDER OF COURT.

This is a petition to review an order of the National Labor Relations Board, respondent herein. The respondent has moved the court to dismiss this action for lack of jurisdiction. After hearing oral argument upon the motion to dismiss, the court has decided that the motion must be granted.

The National Labor Relations Act prescribes the procedure for reviewing orders made by the National Labor Relations Board. That Act provides that petitions to review orders of the board shall be filed in the Circuit Court of Appeals. Petitioner here claims that because the Circuit Court of Appeals was in vacation at the time this petition was filed, it had a right to file the petition in a District Court. Petitioner bases this argument upon the provisions of the Act which allow the National Labor Relations Board seeking an enforcement order, to apply to a District Court for such order, if the Circuit Court is in vacation at the time. However, there is no such provision in the Act relating to the filing of petitions for review.

The Board's petition to enforce its own order is entirely different and distinct from a party's petition for review. The petition for enforcement is one that may be for the benefit of either or both parties, and either or both parties, if aggrieved, must go to the Circuit Court of Appeals for review. Enforcement and review are two distinct proceedings, provided for in different subsections of the Act of Congress. Petitioner could have filed its petition for

review in the Circuit Court even though that court was in vacation, which petition would have been decided before the board's petition for enforcement, filed at a later date. Petitioner can now go to the Circuit Court of Appeals and file an answer to the Board's petition for enforcement, in which case the merits of the Board's decision will be reviewed.

And now, December 10, 1941, the motion to dismiss is sustained, the petition for review is dismissed, and an exception is granted the petitioner.

ALBERT W. JOHNSON,
[SEAL.] *United States District Judge.*

[Endorsed:] No. 737 Civil, In the District Court of the United States for the Middle District of Pennsylvania. Heilig Brothers Company vs. National Labor Relations Board. Order of Court. Filed Dec. 10, 1941. W. H. Mitchell, Clerk, Per W., Dept.

UNITED STATES OF AMERICA,
Middle District of Pennsylvania, ss:

I, W. H. Mitchell, Clerk of the United States District Court in and for the Middle District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket Entries; Petition for Review; Affidavit of Service; Answer of Plaintiff; Motion of Defendant to Dismiss; Notice of Motion; Affidavit of Service of Notice; Affidavit of Service of Motion; Praecipe for Appearance and Order of Court, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Scranton, Pennsylvania, this 15th day of April, A. D. 1942.

W. H. MITCHELL,
Clerk.
by M. W. MAXEY,
Deputy Clerk. (Seal.)

APPENDIX B.

Section 10, (e), (f) and (g) of National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Sec. 151 et seq.)

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such ad-

ditional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

APPENDIX C.

Sec. 2 (3) of National Labor Relations Act and Sec. 10 (c) of National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Sec. 151 et seq.)

Sec. 2 (3)—"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

Sec. 10 (c)—"The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

APPENDIX D.

PETITION FOR REHEARING IN CIRCUIT COURT OF APPEALS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941.

No. 7859.

Decided January 2nd, 1942.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

HEILIG BROS. CO., *Respondent.*

On Petition for the Enforcement of an Order of the National Labor Relations Board.

PETITION OF RESPONDENT FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, the respondent herein, in accordance with the rules established by this Court, respectfully submits its petition for rehearing, and bases its plea upon the grounds hereinafter set forth:

1. This Honorable Court in a *"per curiam"* opinion filed January 2nd, 1942, rendered a decision by the terms of which decision the respondent company, the petitioner herein, was ordered to abide by the findings of the National Labor Relations Board, and this Honorable Court ordered that the Order of the National Labor Relations Board be enforced.

2. Your petitioner herein respectfully urges this Honorable Court to reconsider its decision and to permit your petitioner a rehearing, particularly calling to the atten-

tion of this Honorable Court those parts of the Order which are hereinafter quoted:

Sub-section b in Paragraph 1 of the Order reads as follows:

> "In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Sub-Section d in paragraph #2 of the Order states:

> "Post immediately in conspicuous places at its York plant, and maintain for a period of at least (60) consecutive days from the date of posting, notices to its employees stating (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of this Order."

3. The United States Supreme Court on the 22nd day of December, 1941, delivered its opinion in a case entitled "*National Labor Relations Board* vs. *the Virginia Electric and Power Company, and National Labor Relations Board* vs. *Independent Organization of Employees of the Virginia Electric and Power Company*". In that case the question of constitutional rights of an employer was determined, referring more specifically to the First Amendment of the United States Constitution. Prior to the delivery of said opinion the Board's usual interpretation of the Act was that an employer was not permitted to state the position of the Company with regard to employee organization, more particularly if such statements could be construed to mean that an employer was opposed to organization in the plant.

4. The Petitioner briefly calls attention to certain parts of the decision hereinbefore cited and asks the liberty of comparing certain phases of the case in issue, and the case presently decided by the United States Supreme Court.

In the case at issue the Board has dwelt at length upon the fact that the petitioner, has, at all times, been hostile to labor organizations. Furthermore the Board has said that certain statements made by Cyrus H. Heilig, even though uncorroborated, and certain notices which were caused to be posted by the Management, were coercive and that such action on the part of the Company was taken with the sole purpose of discouraging unionization. The same situation apparently exists, or did exist, in the case decided by the United States Supreme Court, which prior to that time had been determined by the United States Circuit Court of Appeals for the Fourth Circuit, both decisions having been unfavorable to the National Labor Relations Board.

5. Your petitioner respectfully submits that the case at bar wherein it has been accused of violating sections 8 (1) and (5) of the National Labor Relations Act is distinctly on point with the decision in the *Virginia Electric and Power Company* case. The National Labor Relations Board presented its petition for enforcement of its Order during the October term of 1941. An answering brief was thereupon filed by the respondent and the case was argued orally before this Honorable Court during December of 1941, but prior to the time that the decision was rendered in the *Virginia Electric and Power Company* case. Your petitioner is of the opinion that such case has an important bearing upon some of the points at issue and respectfully submits that it should be given an opportunity to enlarge upon similar circumstances appearing in the case at bar and in the *Power Company* case.

6. Your petitioner is desirous of securing a rehearing upon the entire case generally, but specifically upon those parts of the Order which would be affected by the decision hereinbefore previously referred to.

And your petitioner will ever pray, &c.

JOHN F. DUMONT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

Affidavit of Good Faith.

STATE OF NEW JERSEY,
County of Passaic, ss:

John F. Dumont, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a New Jersey attorney admitted to practice before this Court, and I represent Heilig Bros. Co., the petitioning party herein.

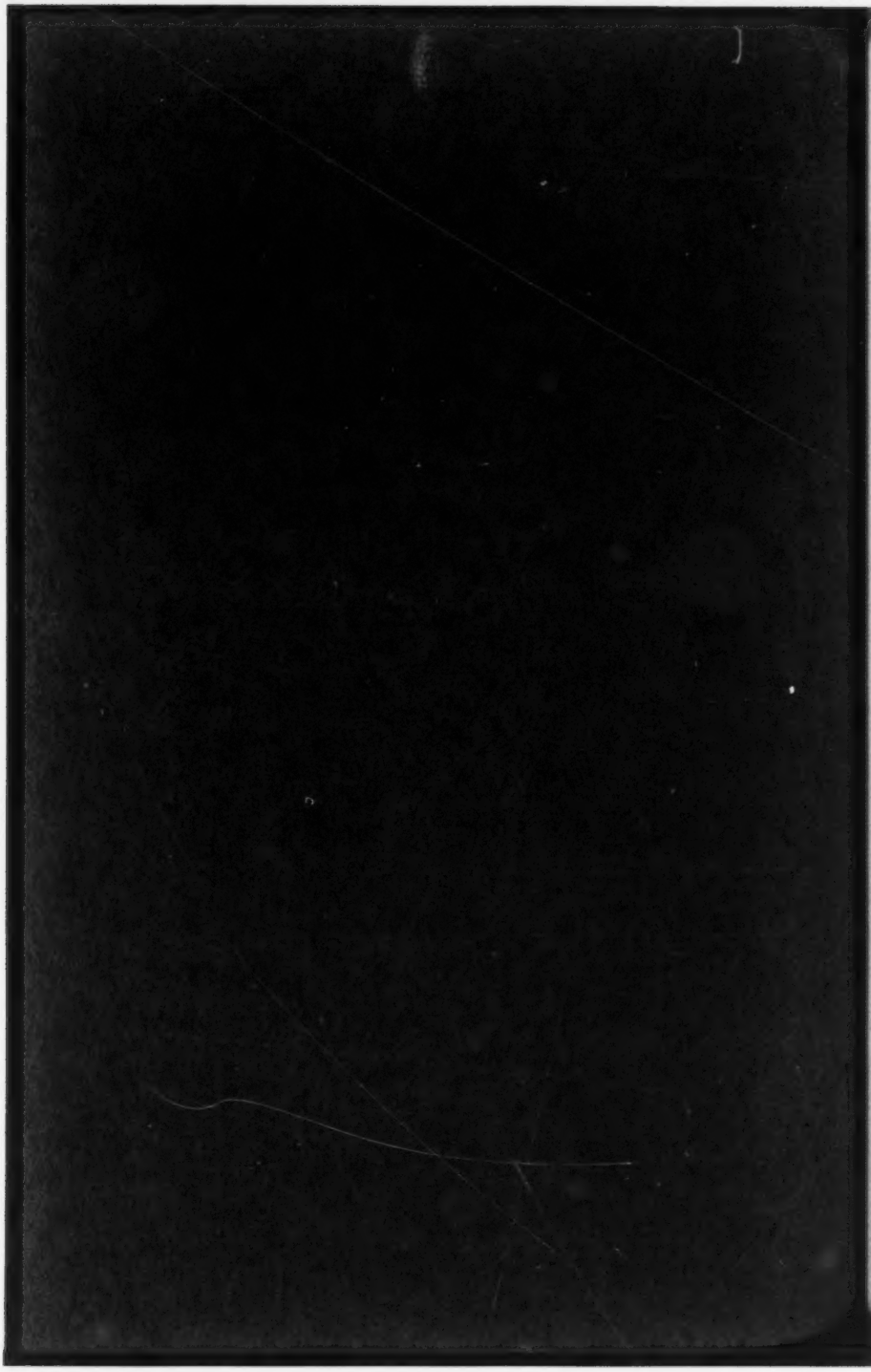
2. I have filed said petition for rehearing primarily because of a new United States Supreme Court decision handed down by said Supreme Court about the same time a decision was rendered in this matter by this Honorable Court. The Supreme Court decision hereinbefore referred to has an important bearing upon the case at issue.

3. The petition herein filed has been filed by me in good faith for the reasons expressed therein, and said petition for rehearing has not been filed for the purpose of delay, but rather to insure to the petitioner herein all rights accruing to it.

JOHN F. DUMONT,
Attorney for Petitioner.

Sworn and subscribed to before me this 14th day of January, 1942.

IRENE FERRAZANO,
Notary Public of N. J.



INDEX

CITATIONS

463133—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet., 46–47) is reported in 42 F. Supp. 311. The *per curiam* opinion of the Circuit Court of Appeals for the Third Circuit (R. II, 101)[1] is reported in 123 F. (2d) 734.

[1] Pursuant to stipulation of the parties (R. II, 107–114), the printed record for purposes of the petition for certiorari consists of the Appendix to the Board's brief in the Circuit Court of Appeals, referred to herein as "R. I"; and designated portions of the stenographic transcript of testimony and the proceedings in the Circuit Court of Appeals contained in "Vol. 2," referred to herein as "R. II."

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 185–221) are reported in 32 N. L. R. B., No. 103.

JURISDICTION

The order of the District Court (Pet., 47) was entered on December 10, 1941. No appeal was taken from this order. The decree of the Circuit Court of Appeals in a separate proceeding was entered on January 31, 1942 (R. II, 105–107). The petition for writs of certiorari was filed on April 30, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. (a) Whether a United States district court had jurisdiction, during the vacation of the courts of appeals, to entertain a petition for review filed by petitioner under Section 10 (f) of the National Labor Relations Act.

(b) Whether this Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended, to issue a writ of certiorari to the district court to review its order dismissing the petition for review.

2. Whether the circuit court of appeals erred in refusing to stay a proceeding for enforcement instituted by the Board, pending the determination of petitioner's review proceeding in the district court.

3. Whether the circuit court of appeals erred in denying petitioner's application for rehearing.

4. A question urged by petitioner but which we think is not properly presented because not urged before the Board or the circuit court of appeals is whether the Board may direct an offer of reinstatement without finding that the men ordered reinstated have not obtained equivalent employment elsewhere and without directing that they first attempt to secure equivalent employment elsewhere.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the petition, pp. 48–50.

STATEMENT

After the usual Board proceedings, the Board, on June 10, 1941, issued its findings of fact, conclusions of law, and order (R. I, 185–221). The Board found and concluded that petitioner had engaged in certain unfair labor practices affecting commerce (R. I, 189–214), and directed that petitioner cease and desist therefrom, offer reinstatement to employees who had participated in a strike caused by petitioner's unfair labor practices, and take certain other affirmative remedial action (R. I, 212–213, 214–215).

On August 14, 1941, petitioner filed in the United States District Court for the Middle District of Pennsylvania a petition to review the Board's order,

asserting that that court had jurisdiction because both the Circuit Court of Appeals for the Third Circuit, in which circuit petitioner resides and transacts business, and the Court of Appeals for the District of Columbia were then in vacation (Pet., 27–31). On September 11, 1941, the Board filed in the district court a motion to dismiss the petition for lack of jurisdiction (Pet., 36–41). On December 10, 1941, the district court handed down an opinion and entered an order granting the motion and dismissing the petition to review (Pet., 46–47). No further proceedings were had in the district court and no appeal was taken from the district court order.

Meanwhile, on October 7, 1941, the Board filed in the United States Circuit Court of Appeals for the Third Circuit a petition to enforce its order against petitioner (R. II, 87–90). Petitioner applied to the circuit court to stay this proceeding pending the determination of the proceeding in the district court (R. II, 91–97); the application for a stay was denied by the circuit court on October 21, 1941 (R. II, 98). On December 17, 1941, the circuit court heard argument on the merits (R. II, 100–101) and on January 2, 1942, handed down a *per curiam* opinion sustaining the Board's order in full (R. II, 101). A petition for rehearing filed by petitioner on January 17, 1942 (R. II, 102–104) was denied by the circuit court on January 31, 1942 (R. II, 105). On the same day, the circuit court entered a decree of enforcement (R. II, 105–107).

ARGUMENT

1. The petition in No. 1199 for a writ of certiorari to the United States District Court for the Middle District of Pennsylvania should be dismissed since this Court lacks jurisdiction to issue its writ to a district court. Section 240 (a) of the Judicial Code, as amended, which petitioner invokes (Pet., 11–12), does not apply to a case in a United States district court but only to a case "in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia * * *." Nor does any other statute of the United States make provision for the issuance of a writ of certiorari to a United States district court.[2] Cf. Section 238 of the Judicial Code, as amended. An additional reason requiring dismissal is that the petition for a writ is not timely (28 U. S. C. § 350), for it was not filed until more than three months after December 10, 1941, the date of the entry of the order, review of which is sought (*supra,* p. 4), and without any extension of time for filing being granted by a justice of this Court.

Moreover, petitioner's contention that the district court has jurisdiction to entertain review proceedings while the courts of appeals are on vacation, raised in both No. 1199 and No. 1200, is with-

[2] The writ may be issued to a circuit court of appeals before argument if the case is in that court (sec. 240 (a)), but here no appeal was filed.

out foundation. Although Section 10 (e) of the National Labor Relations Act permits the Board to bring enforcement proceedings in the district courts while the courts of appeals are on vacation, Section 10 (f) contains no such provision and limits aggrieved persons to review in the courts of appeals. There is no constitutional or logical requirement of mutuality, guaranteeing to a respondent and to the Board identical access to the courts during vacations. Cf. *United States* v. *Bitty*, 208 U. S. 393, 399–400; *United States* v. *Heinze*, 218 U. S. 532, 545–546. The special procedure open to the Board is obviously created because of the possible need for immediate enforcement of the Act in special circumstances. The same need cannot arise for a respondent who is subject to no penalty for noncompliance with a Board order prior to judicial affirmance. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *California* v. *Latimer*, 305 U. S. 255, 260.

2. The petition in No. 1200 for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit presents no question worthy of review:

(a) Petitioner's contention (Pet., 2–3, 4–5, 7–8) that the circuit court erred in denying petitioner's application for a stay of the circuit court proceeding pending the outcome of the district court proceeding (*supra*, p. 4) is without merit. The proceeding in the district court was a nullity for, as we

have shown, that court had no jurisdiction over the subject matter (*supra,* pp. 5–6); the circuit court was not required to hold up the legitimate proceeding awaiting the dismissal of the obviously illegitimate one. Moreover, the circuit court did not finally act to enforce the Board's order until the district court had dismissed that proceeding (*supra,* p. 4). In any event, petitioner suffered no prejudice by the denial of the stay, as demonstrated by the ultimate result in both courts.

(b) Petitioner's contention (Pet., 3, 5–6, 8) that the circuit court erred in denying petitioner's application for rehearing in the face of petitioner's citation of *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, which was not earlier available, is without basis. The Board's findings as to interference are amply supported by evidence apart from the bulletins published by petitioner's officers. Furthermore, the Board's decision contains the findings lacking in the *Virginia Electric* case interpreting the published statements in the context of petitioner's other anti-union conduct (see R. I, 195–209). Petitioner makes no effort to show the contrary.[3]

---

[3] The argument seems to be not that the *Virginia Electric* case necessarily required a different decision in the instant case, but that the court erred in refusing to grant a rehearing to consider its effect. A rehearing is not required merely because this Court renders a decision on a subject after argument in the circuit court of appeals. Nor can it be assumed that the court below failed to examine the *Virginia Electric* opinion before denying petitioner's application for rehearing.

(c) Petitioner's final contention (Pet., 3, 8–9, 14, 24–25) that the Board lacks power to order reinstatement of persons without a finding that they have not obtained other equivalent employment and without a direction that they attempt to secure equivalent employment elsewhere prior to an offer of reinstatement, is not properly before this Court, for the question was never raised before the Board or in the court below.[4] Moreover, the contention is clearly unsound. Petitioner cites *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177 (Pet., 24–25) but that case expressly affirms, not denies, the Board's power to order reinstatement even if equivalent employment has been obtained.[5] And the Board certainly need not, in the absence of a statutory requirement, make affirmative findings on points not disputed before it.

---

[4] Section 10 (e) of the Act provides: "* * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *"

[5] Since the *Phelps Dodge* decision, the Board, pursuant to this Court's affirmation of its power, has exercised its discretion concerning the appropriateness of such relief and has held that effectuation of the Act's policies requires that an offer of reinstatement be made in all cases despite the obtainment of equivalent employment. *Matter of Ford Motor Co.* and *International Union United Automobile Workers of America, Local Union No. 249,* 31 N. L. R. B. No. 170, decided May 21, 1941.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the district court should be dismissed, and that the petition for a writ of certiorari to the circuit court of appeals should be denied.

CHARLES FAHY,
Solicitor General.
ROBERT L. STERN,
Attorney.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
MORRIS P. GLUSHIEN,
RUTH WEYAND,
Attorneys,
National Labor Relations Board.

MAY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1199 AND 1200.

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF OF PETITIONER.

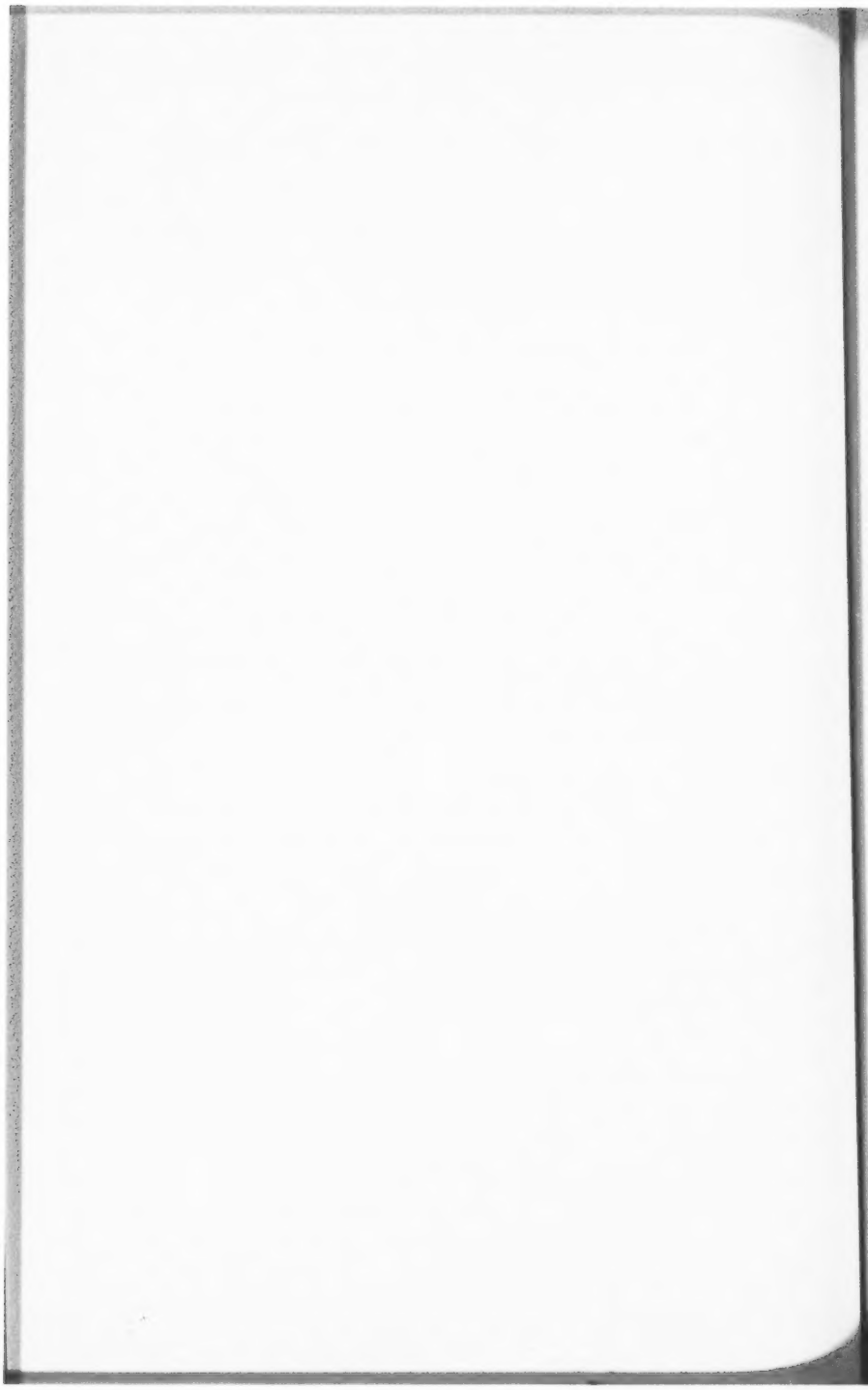
JOHN F. DUMONT,
Little Falls, New Jersey;

JOHN A. HOOBER,
York, Pennsylvania,
Counsel for Petitioner.

HARRY NADELL,
Paterson, New Jersey;

EDMUND M. TOLAND,
Washington, D. C.,
Of Counsel with Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.



Supreme Court of the United States

OCTOBER TERM, 1941.

NOS. 1199 AND 1200.

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF OF PETITIONER.

Petitioner, Heilig Brothers Co., submits the following brief in reply to the answering brief of the National Labor Relations Board, filed May 28, 1942.

This case brings up two phases of the same matter: (1) the refusal of the District Court to review the order of the Board during the vacation of the Circuit Court of Appeals; (2) the subsequent enforcement of the order of the Board by the Circuit Court of Appeals. The essential similarity of these two aspects of the same question is emphasized by the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 24, where Mr. Chief Justice Hughes said:

> "The Board is authorized to petition designated courts to secure the enforcement of its order. . . . Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of the order. Sec. 10."

The same similarity between the enforcement and reviewing provisions is also brought out in *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41, where, at page 49, Mr. Justice Brandeis, said:

> "To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. . . . The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board."

While the application for certiorari to review the action of the District Court in dismissing, during the vacation period of the Circuit Court of Appeals, petitioner's attempt to review the order of the Board, and the application for certiorari to review the action of the Circuit Court of Appeals in enforcing the order of the Board, are separately numbered on the calendar of this Court, only one question is raised on the merits, namely, whether the order of the Board should be sustained.

At the time the case was first argued before the Circuit Court of Appeals on the application of the Board for enforcement, notice of the decision of the District Court dismissing petitioner's application for review had not yet been given to the petitioner's attorney. On the application for re-hearing before the Circuit Court of Appeals, the dismissal of petitioner's application for review by the District Court was brought to the attention of the Circuit Court of Appeals, but the application for re-hearing was nevertheless denied.

The argument made on behalf of the Board, that this Court has no jurisdiction to consider the dismissal of petitioner's application for review, assumes that there is no case pending in the Circuit Court of Appeals. This is con-

trary to the fact. Both the reviewing and enforcing aspects of the order of the Board were brought to the attention of the Circuit Court of Appeals. This is sufficient to bring the case within the jurisdiction of this Court under Section 240 of the Judicial Code, which permits certiorari to issue from this Court in any case in a circuit court of appeals.

As shown by *Forsyth* v. *Hammond,* 166 U. S. 506, at page 513, this Court, on certiorari, is vested with a "comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals."

Mr. Justice Sutherland, in *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, pointed out at page 567 that, on certiorari, the entire record is before this Court.

Hence the filing of the petition for certiorari on April 30, 1942, within three months of the order of the Circuit Court of Appeals granting enforcement of the order of the Board, brings before this Court the entire record both in the Circuit Court of Appeals and in the District Court.

Further ground for the jurisdiction of this Court in certiorari is Section 262 of the Judicial Code, 28 U. S. C. A., Sec. 377. As stated by Mr. Chief Justice Hughes in "*Re* 620 Church Street Building Corp.," 299 U. S. 24, at page 26:

> "That provision (Sec. 262) contemplates the employment of this writ (certiorari) in instances not covered by Sec. 240 of the Judicial Code (28 U. S. C. A., Sec. 347) and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.' U. S. *v.* Beatty, 232 U. S. 463, 467; American Constr. Co. *v.* Jacksonville etc. R. Co., 148 U. S. 372, 379; *Re* Chetwood, 165 U. S. 443, 461; Magnum Import Co. *v.* Coty, 262 U. S. 159."

To the same effect is *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, at page 418, where Mr. Chief Justice Taft said:

> "Our power to grant writs of certiorari extends to interlocutory as well as final decrees, and a mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit our power to review the whole case when it is brought here by certiorari on final decree."

In an earlier case, Mr. Chief Justice Fuller reached the same conclusion in *Ex parte Chetwood*, 165 U. S. 443, 460, specifically mentioning the power of this Court to issue certiorari under the power "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" adding,

> "and under this provision, we can undoubtedly issue writs of certiorari in all proper cases. American Constr. Co. *v.* Jacksonville &c., R. Co., 148 U. S. 372, 380."

In particular, as pointed out in the *Chetwood* case, this Court may review questions of jurisdiction. This accords with a long line of decisions in this Court, beginning with *U. S.* v. *Hamilton*, 3 Dall. 17, and including *Ex parte Milligan*, 4 Wall. 2, *Union Pac. R. Co.* v. *Weld County*, 247 U. S. 282, and an unbroken line of decisions to the same effect.

Petitioner disagrees with the argument made on behalf of the Board that *U. S.* v. *Bitty*, 208 U. S. 393, 399-400, and *U. S.* v. *Heinze*, 218 U. S. 532, 545-546, are authority that equal access to the Courts need not be accorded to the Board and to the petitioner. Both are criminal cases holding that no constitutional right is denied to a criminal accused because he may not secure a review of the overruling of a demurrer to an indictment before final deter-

mination, while the state may, by writ of error, promptly review a ruling of the trial court sustaining a demurrer to an indictment. Aside from the answer that the accused may have his appeal heard after the case has been determined on the merits, the dissimilarity to the present case is that a proceeding before the Board partakes not of a criminal but of an equitable nature.

> *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, at p. 142;
> *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, at p. 48;
> *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, at p. 15.

The argument is made on behalf of the Board that special circumstances might exist creating a need for enforcement of an order of the Board during the vacation of the Circuit Courts of Appeals, while no such need could arise on behalf of petitioner to seek a prompt review of a Board order. To say that noncompliance with a Board order subjects petitioner to no penalty is to encourage noncompliance by denying to petitioner an opportunity for immediate review accorded to the Board. An additional answer is found in subsection (g) of Section 10:

> "The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

The refusal of the District Court to take jurisdiction during the vacation of the Circuit Courts of Appeals, of an application to review an order of the Board, while recognizing the right of the Board to apply to the District Court in vacation for an order of enforcement raises a serious

question of the interpretation of Section 10(e) and (f) of the National Labor Relations Act on the equitable principle of mutuality.

Since the denial of certiorari involves no expression of opinion on the merits of the case (*Atlantic Coast Line R. R.* v. *Powe*, 283 U. S. 401), petitioner respectfully urges that this court should take jurisdiction to determine a doubtful construction of subsections (e) and (f) of Section 10 of the National Labor Relations Act.

Respectfully submitted,

JOHN F. DUMONT,
JOHN A. HOOBER,
Attorneys for Petitioner.

HARRY NADELL,
EDMUND M. TOLAND,
Of Counsel with Petitioner.